But, as we have seen, IN THE DISTRICT COURT, THE GOVERNMENT CATEGORICALLY DISAVOWED THE EXISTENCE OF A FINDING OF FACT BECAUSE "THERE WAS NO EVIDENCE SUFFICIENT TO SUSTAIN A FINDING OF FACT" AND CONSEQUENTLY THE GOVERNMENT "MADE A PRESUMPTION FOLLOWING THE LAW OF THE STATE OF OREGON".

Why these discrepancies? Petitioner submits, it is apparent that the Government was not aware of the advantages which might flow to it, if it could but persuade the Court of Appeals that its determination was indeed grounded solely on a finding of fact supported by the evidence. For as the Government observed in its presentation to the Court below:

> "An administrative finding of fact will not be disturbed without allegation that such fact was not supported by the evidence. Therefore, where there is neither such an allegation, nor grounds presented therefor, the court may not disturb a finding of fact."[1]

It is apparent therefore, that the Government by constant reiteration that its determination could be supported solely on a finding of fact, supported by the evidence, was attempting to place the case squarely within the area of judicial unreviewability. That it succeeded in doing so is manifest by a reading of the majority opinion of the Court below, which stated: "Even if it were reviewable and in our opinion erroneous, we could not disturb it, for it was not arbitrary or unreasonable. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"[2]

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[1] Respondent's brief in the Court of Appeals at page 7.

[2] 270 F. 2d 321.

The majority of the Court below accepted the Government's representations as to the substantive grounds for its determination. But, Judge Burger apparently had some doubts regarding these representations and they are reflected in his dissent as follows:

> "It is not clear from the record whether the Examiner of Inheritance *presumed* the son, Joseph Hayes, to have died exactly seven years after the date of his disappearance or whether he made this finding by weighing all the evidence. More likely he did the former, but whichever he did, his action seems clearly erroneous to me. In other words, if he made a presumption of law, he did so upon an improper interpretation of applicable law. If he made a factual determination, it is not supported by substantial evidence *on the record as a whole*." [1]

By why should there have been any doubt whatsoever in the mind of Judge Burger as to the substantive grounds for the Government's determination. For as Mr. Justice Frankfurter stated in *Security and Exchange Commission* v. *Chenery Corporation* et al; ". . . the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed." "For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." [2]

But we are faced in the instant case with no mere failure of the Government to disclose clearly the grounds for its determination. For what is involved here is an unmistakable misstatement by the Government to the Court of Appeals of the grounds for its determination, which the Government now belatedly concedes in its presentation to this court as follows:

> "Judge Burger's opinion also dealt with alternative contentions made by the Government in the court of

[1] 270 F. 2d 323, 324.

[2] 318 U.S. 80, 94 (1942).

> appeals that the Secretary was not bound to follow Oregon law and that the decision may have been based on an inference of fact from evidence rather than a legal presumption. Upon further examination of the record and discussions with representatives of the Interior Department, we are satisfied that the Secretary, whether required to do so or not, did intend to base his decision on Oregon law and on a legal presumption rather than upon an inference of fact."[1]

Is it unreasonable for this American Indian to ask why the Government failed to disclose to the Court of Appeals the real grounds for its determination? Is it unreasonable for the petitioner to ask why the Court of Appeals, while the matter was still pending before it, was not apprised by the Government that the grounds it asserted as the basis for its determination were misstated as to fact and law? Is it unreasonable for petitioner to inquire why the Government waited until the case was beyond the jurisdiction of the Court of Appeals before this intelligence was communicated to the judiciary, thereby denying the Court below the opportunity to consider whether it desired to alter its position in view of the new posture of the case? Is it unreasonable for petitioner to feel that by misstating the grounds for its determination the Government impeded the judicial review of the Court of Appeals, denied him due process and irreparably prejudiced his case?

THE ONLY REAL SUBSTANTIVE ISSUE IN THE CASE —WHETHER THE SECRETARY ERRED IN HIS APPLICATION OF OREGON LAW—WAS NEVER PASSED UPON BY THE MAJORITY IN THE COURT BELOW.

In its brief in opposition to the petition for certiorari the Government states:

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[1] See footnote on page 6 of Respondent's brief in opposition.

> "Upon further examination of the record and discussions with the representatives of the Interior Department, we are satisfied that the Secretary, whether required to do so or not, did intend to base his decision on Oregon law . . ."[1]

If the Secretary, as now stated, did intend to base his decision on Oregon law, the Government not only failed to disclose this intention to the Court of Appeals, but as the record will show, it was expressly disavowed. In this connection the Government stated in its brief to the Court of Appeals:

> "The Secretary is not required to follow State law, except for the law of descent and distribution . . ."[2]
> "The Oregon law on presumptions cannot be included in the category of laws normally intended by the terms 'descent and distribution'."[3]

> "Thus the Secretary is fully able to apply the federal rule as to the presumption of continuance of life, for to do otherwise would be clearly in error and inconsistent with the early decisions on similar issues before the Secretary."[4]

Thus the record shows that the Government stated to the Court of Appeals that Oregon law was inapplicable and that the substantive law that it was relying upon as the basis for its determination was "federal", and "to do otherwise would be clearly in error." Now we are told that the Secretary did intend to apply Oregon law after all; and that the Secretary relied on the decision in *Massachusetts Bonding & Ins. Co.* v. *Holman*, 62 F. 2d 902 (C.A. 9, 1933). An exhaustive search of the legal memoranda and brief submitted by the Government in the

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[1] Government's brief in opposition at page 6.

[2] Government's brief in the Court of Appeals, at page 8.

[3] Ibid. at page 15.

[4] Ibid. at page 14.

District Court and the Court of Appeals fails to disclose any mention whatsoever by the Government of this case. Thus the Court below was never afforded an opportunity to review judicially this 9th Circuit case which the Government belatedly alleges is the "Oregon Law" upon which the Secretary relies as the basis for his determination.

A careful reading of the *Massachusetts Bonding* case, supra, will reveal that the Oregon Statute referred to in this decision was Section 10-510 of the Oregon Code Annotated which reads:

> "When any estate shall be devised to any child, grand child or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator."

This Oregon statute was a remedial statute designed to protect lineal descendants of a devisee who predeceased the testator, and to prevent the lapsing of the devise. The issue of the case was whether this remedial statute was to be given a strict or liberal construction. This Oregon Statute clearly has no bearing in the instant case because Emma Luton (to whom the Secretary would distribute the Estate of John Thomas), manifestly, is not a lineal descendant of the devisee Joseph Thomas. Moreover, a careful reading of the opinion of the 9th circuit Court of Appeals in the *Massachusetts Bonding* case, supra, will reveal that although the District Court may have predicated its decision on this Oregon statute, the Circuit Court indicated that its decision did not rest on a construction of this Oregon statute, at all. For as the Court stated: "This statute has not been construed by the court of the State . . ." and "It is not necessary to examine the Oregon statute, as the view we take upon the other point is decisive."[1] Since the 9th Circuit did

[1] 62 F. 2d 902, 904 (1933).

not rely on the Oregon Statute and since no opinions of the Oregon Courts were cited as authority for its determination, what was the basis for the Courts opinion? A reading of the opinion in the case will reveal that the Court, consistent with the then prevailing doctrine of *Swift* v. *Tyson*[1] was applying "federal general law" in its determination in the *Massachusetts Bonding* case, supra. Yet, this is the case which the Government now asserts is the "Oregon Law" upon which its determination is based.

A clear exposition of the Oregon law which governs in the instant case was made by Judge Burger in his dissent, when he said:

> "If we apply the law of Oregon, then the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in *Hefford* v. *Metropolitan Life Ins. Co.* supra. It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable."[2]

But as the Government itself concedes, the question whether Oregon law was correctly or reasonably applied by the Government was never reached by the majority of the Court below. Petitioner cannot help but feel, on the record of the case, that the judicial deliberations of the court below were rendered futile by the failure of the

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[1] 16 Pet. 1 (1842).

[2] 270 F. 2d 319, 325 (1959); It should be noted that *Hefford* v. *Metropolitan Life Insur. Co.*, 173 Or. 353, 144 P. 23 695, was decided by the Supreme Court of Oregon in 1944, eleven years after the 9th Circuit Court of Appeals' decision in *Massachusetts Bonding & Ins. Co.* v. *Holman* which appeared in 1933.

Government to disclose to the court the real grounds for its determination. Moreover, the efforts and substantial sums expended by this Indian petitioner, which he could ill afford, were entirely wasted because the majority never reached the real substantive issue of the case. Equally shocking, however, is that the Department of the Interior, having rendered the Court of Appeal's judicial review ineffectual, would now choke off this Indian petitioner's only remaining avenue to a judicial review of the substantive issue in this case.

In the past this Court has clearly indicated that it would review cases where the governmental agency failed to disclose clearly the grounds for its determination. For as Mr. Justice Frankfurter has said: "This increasing tendency of the courts to scrutinize the legal grounds given by administrative agencies for their actions may well promote greater responsibility in the agencies exercise of authority and in their justification of that exercise."[1]

DESPITE THE GOVERNMENT'S CONTENTION, UNDER THE GENERAL ALLOTMENT ACT, THE SECRETARY IS OBLIGED TO APPLY STATE LAW.

In its brief in opposition to the petition for certiorari the Government states that ". . . the Secretary *whether required to do so or not*, did intend to base his decision on Oregon law . . ."[2] (Emphasis Supplied). Thus the Government takes the position that whether so called "federal general law" or State law is applied by the Government in determining Indian probate matters, is optional with the Secretary of the Interior.

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[1] Mr. Justice Frankfurter, "John Marshal and the Judicial Function", 69 H.L.R. 217, 233 (1955).

[2] See footnote on page 6 of Respondent's brief in opposition.

But, as Judge Burger states in his dissent: ". . . the Secretary is bound by the General Allotment Act to follow state laws in matters concerning descent and distribution. 24 Stat. 389 (1887), as amended, 25 U.S.C. sec. 348."[2] This is also the view of the Court in *Peoria Tribe or Band of Indians* v. *Wea Townsite Co. et al.* 117 F. 2d. 940, 942 (C.A. 10, 1941).

The Government, by its own assertion, would leave the door open to the application of so called "federal general law" or State law, in this or any other case, as it chooses and as expediency would dictate, despite the express mandate of the Congress that State law must be applied by the Secretary.

This Governmental assertion of optional power leaves unresolved this question of Federal statutory interpretation and the constitutional question whether the Executive with regard to Indian probate matters is enforcing the express mandate of the Congress.

These unresolved questions not only affect the individual Indian petitioner Joe Hayes, they also affect about a quarter of a million Indians who are subject to the probate jurisdiction of the Secretary of the Interior.

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[2] 270 F. 2d 319, 325.

CONCLUSION

For the foregoing reasons, and those advanced by petitioner in his earlier submission to this Court, it is respectfully submitted that the petition for writ of certiorari should be granted.

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